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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 445

AVCO CORPORATION,

Petitioner

v.

AERO LODGE No. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (A. 38-48) is reported at 376 F. 2d 337.

JURISDICTION

The judgment of the Court of Appeals was entered May 2, 1967. (A. 48-49) The petition for certiorari was filed July 31, 1967, and was granted October 9, 1967. This Court has jurisdiction under 28 U.S.C. 1254(1) (1964).

QUESTIONS PRESENTED

(1) Whether a state court suit by an employer seeking an injunction for breach of the "no-strike" clause in a collective bargaining agreement may be removed by the defendants to the United States District Court as a civil action of which the District Court has original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States; and (2) whether, after removal, the state court injunction previously issued enforcing a "no-strike clause" should be dissolved by the United States District Court.

STATUTES INVOLVED

This case involves Sections 1441 and 1447 of the Judicial Code of 1948, 62 Stat. 937-939, as amended, 63 Stat. 102 (1949) and 78 Stat. 266 (1964), 28 U.S.C. 1441, 1447 (1964); Sections 1, 2, 4, 7 and 13 of the Norris-LaGuardia Act of 1932, 47 Stat. 70-71, 73, 29 U.S.C. 101, 102, 104, 107 and 113 (1964); and Section 301 of the Labor Management Relations Act, 1947, 61 Stat. 156-157, 29 U.S.C. 185 (1964). The relevant statutory provisions are set forth in Appendix A, *infra*, pages App. A, 1-8.[1]

STATEMENT

The State Chancery Court Suit

On October 15, 1965, Petitioner filed its Bill of Complaint in the Chancery Court for Davidson County, Tennessee, praying for injunctive relief against recurrent strikes in violation of the express "no-strike" commitment in its collective bargaining agreement with Aero Lodge No. 735, International Association of Machinists and Aerospace Workers (herein called "Aero Lodge"), as well as

[1] The separately bound Appendix is referred to herein as "A." The Appendix annexed to this brief is referred to herein as "App. A."

in violation of the explicit prohibition against work stoppages contained in the grievance and arbitration procedures of that agreement. The Bill averred facts showing that the interruptions of work had obstructed or halted vital production for the national defense, including military hardware then actively utilized in Vietnam, and that the legal remedy was inadequate. Named as defendants were Aero Lodge and numerous persons joined individually and as officers or committee members of Aero Lodge, together with other persons joined individually and as representatives of the class engaged in the activities alleged. (A. 2-10)

On the same date, a Chancellor of the Chancery Court for Davidson County directed the issuance of a temporary injunction as prayed for, upon the giving of an appropriate bond in the amount of $10,000.00. (A. 10)

The Proceedings in the U. S. District Court

The defendants named in the Bill thereupon filed a Petition for Removal of the cause to the United States District Court for the Middle District of Tennessee, Nashville Division. (A. 11) Immediately thereafter, they filed in the District Court a motion to dissolve the temporary injunction, and to dismiss the case, advancing the argument that the complaint sought, and Petitioner had been granted, relief which the District Court had no power to issue and maintain under the limitations of the Norris-LaGuardia Act.[2]

Petitioner promptly moved in the District Court to remand the cause to the Chancery Court for Davidson County, urging (1) that the suit was not founded on a claim arising under the laws of the United States, as averred in the removal petition, but instead was founded on a claim of breach of contract arising under state law,

[2] 47 Stat. 70 (1932), 29 U.S.C. 101 (1964). (App. A, page 2)

and (2) that the District Court, by reason of the Norris-LaGuardia Act, had no original jurisdiction satisfying the requisites of the removal sections of the Judicial Code.[3]

The District Court, by its order entered March 2, 1966, denied the Petitioner's motion to remand, granted the motion to dissolve the injunction, and denied the motion to dismiss the action. (A. 17-22) In refusing to remand the cause to the Tennessee Chancery Court, the District Court expressly recognized that the Court of Appeals for the Third Circuit had held squarely to the contrary in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L.Ed. 2d 822. (A. 18)

After a motion for reconsideration before the District Court (A. 23-35) was denied by an order entered on March 23, 1966 (A. 36-37), an appeal was taken by Petitioner to the Court of Appeals for the Sixth Circuit. (A. 37)

The Decision of the Court of Appeals

On appeal the Court of Appeals refused to accept the holding of its sister Circuit in *American Dredging*[4] and affirmed the judgment of the District Court. (A. 38-49) Rejecting the concept that Petitioner's suit in the Chancery Court was based exclusively upon a state-created right, the Court of Appeals characterized all actions involving the breach of collective bargaining agreements in industries affecting interstate commerce as preemptively governed by

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[3] The joinder of Tennessee citizens as defendants rendered the case removable under Section 1441(b), only upon establishment of "arising under" jurisdiction founded on the "laws of the United States." 62 Stat. 938 (1948), 28 U.S.C. 1441(b) (1964). (App. A, page 1)

[4] American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Engineers, *supra* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L.Ed. 2d 822.

Section 301 of the Labor Management Relations Act.[5] According to the Sixth Circuit's reading of *Textile Workers Union* v. *Lincoln Mills* (1957) 353 U.S. 448, 1 L.Ed. 2d 972 and *Local 174, Teamsters* v. *Lucas Flour Co.* (1962) 369 U.S. 95, 7 L.Ed. 2d 593, state law no longer exists "as an independent source of private rights to enforce collective bargaining contracts." (A. 42) Also, federal law does not permit continued injunctive enforcement of collective bargaining agreements by state courts.

Having depicted Petitioner's action as one arising under the laws of the United States and, therefore, removable, the Court of Appeals went on to declare that Section 4 of the Norris-LaGuardia Act[6] did not withdraw jurisdiction of the Petitioner's suit from the federal courts so as to defeat removal. In so doing, the court below expressly rejected the Third Circuit's decision in *American Dredging*. (A. 40)

The Court of Appeals approved the action of the District Court in dissolving the state court injunction previously issued. The Court of Appeals recognized that Norris-LaGuardia "specifically applies only to Federal Courts" (A. 46) but nonetheless announced the view that uniform development of the federal law of labor contracts would be undermined by the existence of the differing injunctive remedies available in the various States. Hence, the court asserted that "the remedies available in State Courts are limited to the remedies available under Federal law." (A. 47) Summarizing the opinion of the Court of Appeals in its own words (A. 48):

> "Avco's claim arises under the laws of the United States, and the complaint states an action over which the District Court had original jurisdiction. Federal labor policy must have uniform application. The

[5] 29 U.S.C. 185 (1964). App. A, pages 7-8)
[6] 29 U.S.C. 104 (1964). (App. A, page 3)

Congress has declared that injunctions shall not issue to restrain peaceful picketing."

SUMMARY OF ARGUMENT

This case explores the interplay of the *Norris-LaGuardia Act of 1932*, the *Labor Management Relations Act, 1947*, and the removal sections of the *Judicial Code of 1948*. Its decision should be governed by applicable Constitutional provisions, and by the intent of Congress disclosed in the plain meaning of the language employed in the statutes, and in relevant legislative history.

The importance of the case to meaningful collective bargaining and labor peace cannot be exaggerated. Respect for the no-strike clause, the civilized grievance and arbitration procedures of collective bargaining agreements, and prompt and effective suppression of "wildcat" strikes in violation of contract, are essential if the institution of collective bargaining is to survive and serve the public interest.

Under the Tenth Amendment judicial power is reserved to the States unless withdrawn by specific enactment of Congress. In the exercise of this reserved power, state courts of equity have enjoined strikes in breach of contract where the legal remedy was shown to be inadequate and irreparable injury was threatened.

When Congress enacted the *Norris-LaGuardia Act* in 1932, it intended and stated that its restrictive provisions apply only to federal courts. Accordingly, the Act has not heretofore been regarded as limiting state court jurisdiction to enforce labor contracts by enjoining strikes in breach of express or implied agreements not to strike.

Congress, in enacting the *Labor Management Relations Act, 1947*, had no thought or intention of altering thereby or diminishing in any way the existing remedial jurisdiction of state courts of equity. The "basic purpose of Sec-

tion 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." The intention was "not to encroach" on and "not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations." [7] The extension of *Norris-LaGuardia* restrictions to state courts was not intended or even considered. Therefore, this traditional field of state court jurisdiction was not affected nor preempted.

There is not the slightest indication, and no contention, that in enacting the removal sections of the *Judicial Code of 1948*, which merely consolidated previous removal provisions and up-dated and simplified phraseology, Congress intended to extend the coverage of *Norris-LaGuardia* or diminish existing state court jurisdiction.

In reviewing the interplay of the three crucial statutes, and reconciling them, one must conclude, therefore, that the court below erred when it held that (a) Norris-LaGuardia restraints now apply to state courts, (b) an injunction suit filed in a state court to enforce a union agreement not to strike is founded on "a claim or right arising under the Constitution, treaties or laws of the United States" and (c) the instant suit is a "civil action of which the district courts have original jurisdiction," all within the meaning of the removal sections of the *Judicial Code of 1948*, 62 Stat. 938, 28 U.S.C. 1441(b) (1964).

The conflicting decision of the Court of Appeals for the Third Circuit in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers* (CA 3; (1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L. Ed. 2d 822 is correctly decided. The decision of the Sixth Circuit should be reversed, with directions to

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[7] Charles Dowd Box Co. v. Courtney (1962) 368 U.S. 502, 508-09, 511, 7 L.Ed. 2d 483, 488-89.

reinstate the injunction erroneously dissolved and remand the cause to the Chancery Court for Davidson County, Tennessee.

ARGUMENT

I

ABSENT FEDERAL STATUTORY PREEMPTION, THE TENNESSEE CHANCERY COURT HAD JURISDICTION TO ENTERTAIN THE CAUSE AND ISSUE THE INJUNCTION OF OCTOBER 15, 1965.

Under the Tenth Amendment to the Constitution of the United States, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." The Chancery Court of Tennessee, in which the instant cause was initially filed, was created by the Legislature in 1858. Tenn. Code Ann. 16-601 (1955). It was empowered to function and still does function as a separate equity court hearing only equity cases and granting only equity remedies.[8]

The Bill of Complaint which initiated this proceeding in the court below was filed by the Petitioner in the Chancery Court for Davidson County, Tennessee. It alleged facts entitling the Petitioner to equitable relief under the traditional usages of equity and prayed only for an injunction and such "general relief" as a court of equity could grant. The prayer for "general relief" was immaterial.[9]

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[8] Besides Tennessee, four other states have separate equity courts:

Arkansas—Ark. Stat. Ann. §§ 27-201-15 (1947)
Delaware—Const., Art. 4, § 10, Del. Code Ann. (1966).
Mississippi—Const., §§ 156, 157, 159, Miss. Code Ann. (1956)
Vermont—Vt. Stat. Ann., Tit. 4, § 211-18 (1959)

[9] The Supreme Court of Tennessee has held that under Tennessee Chancery practice such a prayer is of no significance. If the injunctive prayer is denied, the suit will be dismissed without further proceedings. Mengle Box Co. v. Lauderdale County (1921) 144 Tenn. 266, 230 S.W. 963. The Bill of Complaint in *Mengle* contained a prayer for general relief (A. 35), but notwithstanding

In view of the allegations in the sworn Bill of Complaint, the Chancery Court, under Tennessee law and practice, clearly had the right to issue the fiat of October 15, 1965 (A. 10), directing the Clerk to "issue the injunction prayed for therein." The action of the Tennessee court in enjoining the strike in breach of the "no suspension of work" provision of Article IX of the collective bargaining agreement and of the "no-strike clause" of Article XIII (A. 5-6) to avert irreparable injury was in conformity with the law of most states,[10] existing under the reserve powers protected by the Tenth Amendment to the Constitution of the United States.

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this, a decree dissolving the injunction therein was deemed a final decree, since there was nothing left for future determination. Accord: Caldwell v. Hufstetter (1938) 173 Tenn. 225, 116 S.W.2d 1017.

[10] See, for example: *Alabama*—Alabama Cartage Co. v. Int'l Bhd. of Teamsters (1948) 250 Ala. 372, 34 So. 2d 576; *California*—McCarroll v. Los Angeles County District Council of Carpenters (1957) 49 Cal. 2d 45, 315 P. 2d 322, *cert. denied* (1958) 355 U.S. 932, 2 L. Ed. 2d 415; A. I. Gage Plumbing Supply Co. v. Local 300, Int'l Hod Carriers (1962) 202 Cal. App. 2d 197, 20 Cal. Rptr. 860; *Iowa*—Dugdale Construction Co. v. Local 538, Operative Plasterers (1965) 257 Iowa 997, 135 N.W. 2d 656; *Kentucky*—Armco Steel Corp. v. Perkins (1967) 411 S.W. 2d 937, 64 LRRM 2539; *Minnesota*—McLean Distributing Co. v. Local 993, Brewery and Beverage Drivers (1959) 254 Minn. 204, 94 N.W. 2d 514, *cert. denied* (1959) 360 U.S. 917, 3 L. Ed. 2d 1534; *New York*—Dairymen's League Cooperative Ass'n v. Conrad (1962) 33 Misc. 2d 914, 228 N.Y.S. 2d 420, *aff'd*, 16 App. Div. 2d 869, 229 N.Y.S. 2d 736; Bee Line Inc. v. Long Island Local 252, Transport Workers (1956) 157 N.Y.S. 2d 232; Anchor Motor Freight v. Teamsters Local 445 (1958) 12 Misc. 2d 757, 171 N.Y.S. 2d 506, *aff'd*, 5 App. Div. 2d 869, 171 N.Y.S. 2d 511, *further proceedings*; 10 App. Div. 2d 994, 204 N.Y.S. 2d 98 *and* 11 App. Div. 2d 766, 204 N.Y.S. 2d 891; Republic Aviation Corp. v. Republic Lodge 1987, Int'l Ass'n of Machinists (1957) 10 Misc. 2d 783, 169 N.Y.S. 2d 651; McLean Trucking Co. v. Doyle (1959) 17 Misc. 2d 478, 184 N.Y.S. 2d 114, *aff'd*, 8 App. Div. 2d 789, 188 N.Y.S. 2d 943, *motion for leave to appeal denied*, 9 App. Div. 2d 677, 193 N.Y.S. 2d 223; *Ohio*—General Electric Co. v. UAW (1952) 93 Ohio App. 139, 108 N.E. 2d 211, *appeal dismissed*, 158 Ohio St. 555, 110 N.E. 2d 424; Foley Construction Co. v. Teamsters Local 100 (1960) 85 Ohio L. Abs. 332, 14 Ohio Op. 2d 59, 172 N.E. 2d 170; *Pennsylvania*—Shaw Electric Co. v. Local 98, IBEW (1965) 418 Pa. 1, 208 A. 2d 769; General Bldg. Contractors Ass'n v. Local 542 (1952) 370 Pa. 73, 87 A. 2d

II

THE JURISDICTION OF THE TENNESSEE CHANCERY COURT TO ENTERTAIN THE CAUSE AND ISSUE THE INJUNCTION HAS NOT BEEN PREEMPTED BY FEDERAL LEGISLATION

A. The Power of a State Court to Exercise Jurisdiction Reserved to the State by the Tenth Amendment May Only Be Restricted by the Constitution of the United States or Federal Legislation.

In *Douglas* v. *City of Jeannette* (1943) 319 U.S. 157, 87 L.Ed. 1324, this Court held that:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution." 319 U.S. at 162-63.

B. The Restrictions of the Norris-LaGuardia Act Do Not Apply to the Tennessee Chancery Court.

By its express terms, the provisions of the Norris-LaGuardia Act of 1932, 47 Stat. 70, 29 U.S.C. 101 (1964) (App. A., page 2) apply only to a "court of the United States, as defined in this chapter." Section 13 of the Act, in paragraph (d) states that:

> "The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia." 47 Stat. 73, 29 U.S.C. 113(d) (1964) (App. A, pages 6-7)

250; Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n (1955) 382 Pa. 326, 115 A. 2d 733, *cert. denied*, 350 U.S. 843, 100 L. Ed. 751; *Washington*—Associated Gen'l Contractors v. Trout (1961) 59 Wash. 2d 90, 366 P. 2d 16.

This Court, in *Sinclair Refining Co.* v. *Atkinson* (1962) 370 U.S. 195, 8 L.Ed. 2d 440 described the Norris-LaGuardia Act as one which "barred *federal* courts from issuing injunctions" in specified cases. 370 U.S. at 196 (emphasis added) The Court of Appeals below, in its opinion, acknowledged that "Section 4 (of Norris-LaGuardia) specifically applies only to *Federal Courts. . . .*" 376 F. 2d 342 (A. 46, emphasis added). Thus, it is undisputed that when enacted, the Norris-LaGuardia Act applied only to federal courts. It cannot apply to the Tennessee Chancery Court unless some subsequently enacted federal statute has extended its limitations to state courts.[11]

C. Section 301 of the Labor Management Relations Act, 1947, Does Not Extend the Limitations of the Norris-LaGuardia Act to State Courts.

The only statute relied on by the courts below as a basis for holding that the restraints of the Norris-LaGuardia Act now apply to the Tennessee Chancery Court is Section 301 of the Labor Management Relations Act, 1947, as amended. 61 Stat. 156-157, 29 U.S.C. 185 (1964). (App. A, pages 7-8) The court below construed Section 301 as containing "a clear declaration of congressional policy against enjoining peaceful picketing which we must now follow and apply as part of Federal labor law." 376 F. 2d 342 (A. 46)

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[11] "[Norris-LaGuardia] explicitly applies only to the authority of *United States courts* 'to issue any restraining order or injunction.' All other remedies in federal courts and *all remedies in state courts remain available.*" Frankfurter and Greene, *The Labor Injunction* (1930) at page 220. (emphasis added) Accord: International Longshoremen's Union v. Wirtz (CA 9; 1948) 170 F. 2d 183, 185-186, *cert. denied* (1949) 336 U.S. 919, 93 L. Ed. 1082, *rehearing denied*, 336 U.S. 971, 93 L. Ed. 1121; McCarroll v. Los Angeles County District Council (1957) 49 Cal. 2d 45, 315 P. 2d 322, 332-33, *cert. denied* (1958) 355 U.S. 932, 2 L. Ed. 415; Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n (1955) 382 Pa. 326, 115 A. 2d 733, *cert. denied* (1955) 350 U.S. 843, 100 L. Ed. 751; Shaw Electric Co. v. Local 98, IBEW (1965) 418 Pa. 1, 208 A. 2d 769, 775, n. 17.

Citing decisions of this Court subsequent to the landmark decision in *Textile Workers Union* v. *Lincoln Mills* (1957) 353 U.S. 448, 1 L.Ed. 2d 972, the court below reasoned that:

> "If remand is granted, State Courts would become the preferred forum for adjusting breaches of no-strike clauses in collective bargaining agreements in industries affecting interstate commerce. Not only would this undermine a uniform development of the law, but the availability and effectiveness of the injunctive remedy would vary from State to State. Consequently, in order to achieve this uniformity of application, the remedies available in State Courts are limited to the remedies available under Federal law." 376 F. 2d 343 (A. 47).

It is submitted that the above conclusions of the Court of Appeals are erroneous. By its terms, Section 301 makes no reference whatsoever to state courts. It makes no reference to the Norris-LaGuardia Act. It makes no reference to injunctions or injunctive relief. By its terms, all that the crucial paragraph (a) of Section 301 does is confer on the federal courts a jurisdiction over suits for violation of collective bargaining contracts which did not previously exist. Paragraph (a) merely states:

> "*Suits for violation of contracts between an employer and a labor organization* representing employees in an industry, affecting commerce as defined in this Act, or between any such labor organizations, *may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.*" (App. A, page 7; emphasis added).

In *Textile Workers Union* v. *Lincoln Mills, supra* (1957) 353 U.S. 448, 1 L.Ed. 2d 972, the Court, in construing Section 301(a), concluded:

> ". . . that the *substantive* law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456 (emphasis added).

Any possible thought that this reasoning meant that state court jurisdiction over suits to enforce labor contracts had been preempted by Section 301 and that the state courts no longer had jurisdiction to enforce labor contracts after the enactment of Section 301 was dissipated by the Court's subsequent decision in *Charles Dowd Box Co.* v. *Courtney* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, in which it was held that "in enacting § 301(a)" Congress did not intend "to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal." 368 U.S. at 507.

It seems evident that the "federal law" to be fashioned from the policy of national laws under Section 301(a) is limited to "substantive" areas and does not cover the entire field of law brought into play by a suit to enforce a collective bargaining agreement. In *Lincoln Mills, supra* (1957) 353 U.S. 448, 457, 1 L. Ed. 2d 972, this Court expressly limited its ruling on uniformity to "substantive law." In *Smith* v. *Evening News Ass'n* (1962) 371 U.S. 195, 200, 9 L. Ed. 2d 246, the Court referred to "a uniform body of federal *substantive* law." (emphasis added) In *Local 174, Teamsters* v. *Lucas Flour Co.* (1962) 369 U.S. 95, 7 L. Ed. 2d 593, the Court stated that:

> "The dimensions of § 301 requires the conclusion that *substantive* principles of federal labor law must be paramount in the area covered by the statute." 369 U.S. at 103 (emphasis added).

It reasoned that:

> "Once the collective bargain was made, the possibility of conflicting *substantive* interpretation under com-

peting legal systems would tend to stimulate and prolong disputes as to its interpretation." 369 U.S. at 103-104 (emphasis added).

The Court said:

"The importance of the area which would be affected by separate systems of *substantive* law makes the need for a single body of federal law particularly compelling." 369 U.S. at 104 (emphasis added).

Likewise, in *UAW* v. *Hoosier Cardinal Corp.* (1966) 383 U.S. 696, 16 L. Ed. 2d 192, the Court stated that:

"Once the collective bargain was made, the possibility of conflicting *substantive interpretation* under competing legal systems would tend to stimulate and prolong disputes as to its interpretation." 383 U.S. at 702 (emphasis added).

In footnote 4, the Court for the first time suggested what it had meant in these decisions by the significant limiting adjective "substantive." The Court stated:

"Our cases have spoken of the federal law applicable to § 301 suits as 'substantive,' see, e.g., Textile Workers v. Lincoln Mills, 353 U.S. at 456, 1 L. Ed. 2d at 980, and the need for uniformity in the 'substantive principles' that govern these suits. [Citing *Lucas Flour* at 599] In the view we take of the problem presented here, we need not decide whether statutes of limitations are 'substantive' or 'procedural.' [Citing cases] Nor need we rigidly classify them as 'primary' or 'remedial.' To the extent that these terms are useful, we need only notice that lack of uniformity in limitations provisions is unlikely to have substantial effect upon the private definition or effectuation of 'substantive' or 'primary' rights in the collective bargaining process. See Wellington, Labor and the Federal System, 26 U. Chi. L. Rev. 542, 556-559."

In rejecting the contention that State statutes of limitations should not apply to Section 301 suits, this Court noted that "the teaching of our cases does not require so bald a form of judicial innovation." 383 U.S. at 701. The fashioning of uniform federal law should be strictly limited to areas required for the achievement of the objectives of Congress when it enacted the law twenty years ago. The Court stated that:

> "The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal law is chiefly designed to promote—*the formation of the collective agreement* and the *private settlement of disputes under it.*" 383 U.S. at 702 (emphasis added).

In *Local 174, Teamsters* v. *Lucas Flour Co., supra* (1962) 369 U.S. 95, 103, 7 L. Ed. 2d 593, the Court noted the desirability of uniform construction of contract terms as a typical area requiring uniformity. The Court, in *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 16 L. Ed. 2d 192, quoted *Lucas Flour* as stating that:

> "The possibility that individual contract terms might have different meanings under [two systems of law] would inevitably exert a disruptive influence upon both the *negotiation* and *administration of* collective agreements." 383 U.S. at 701-02 (emphasis added).

In applying the tests of Congressional intent and achievement of Congressional objectives, the Court reasoned that if contract provisions had different meanings under two or more systems of law, it would impede the process of *negotiating* an agreement and would also "*tend to stimulate and prolong disputes* as to its interpretation." 383 U.S. at 702 (emphasis added).

If the tests of Congressional intent and achievement of Congressional objectives are applied to the problem posed in the instant case, it seems clear that the decision of the court below is erroneous. When it enacted Section 301 in 1947, Congress never intended such a result. Indeed, this decision frustrates the achievement of basic Congressional objectives.

A basic objective of Congress in enacting Section 301 was to reduce the number and duration of strikes by enhancing and expanding the enforcement of collective bargaining agreements into which employers are compelled to enter under the system of law set forth in the National Labor Relations Act, as construed and applied by the National Labor Relations Board. Senate Report No. 105, 80th Cong., 1st Sess., quoted in *Lincoln Mills, supra* (1957) 353 U.S. 448, 454, 1 L. Ed. 2d, 972, emphasized that:

> "Without some *effective* method of *assuring* freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." Senate Report at 16 (emphasis added).

and further stated that:

> "Statutory recognition of the collective agreement as a valid, binding and *enforceable* contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." Senate Report at 17-18 (emphasis added).[12]

After reviewing the legislative history, this Court stated, in *Dowd Box, supra* (1962) 368 U.S. 502, 7 L.Ed. 2d 483:

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[12] The legislative history of Section 301 is fully summarized in an appendix to the Court's decision in Textile Workers Union v. Lincoln Mills, *supra* (1957) 353 U.S. 448, 485-546, 1 L. Ed. 2d 972, 997-1027.

> "The legislative history makes clear that *the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums* for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that *Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.*" 368 U.S. at 508-09 (emphasis added).

The Court further said that:

> "The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts *was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts* made by labor organizations." 383 U.S. at 511 (emphasis added).

and also stated:

> ". . . the entire tenor of the 1947 legislative history confirms that the purpose of § 301, like its counterpart in the Case bill, was to fill the gaps in the jurisdictional law of some of the States, *not to abolish existing state court jurisdiction.*" 383 U.S. at 512 (emphasis added).

The Court quoted Senator Ferguson as stating, with respect to Section 301, "*It takes away no jurisdiction of the State courts.*" 383 U.S. at 512 (emphasis added). The Court observed that:

> "Section 301(a) reflects congressional recognition of the *vital importance of assuring the enforceability of such agreements.*" 383 U.S. at 509 (emphasis added).[13]

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[13] In Dowd Box, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, the Court noted that:

> "The direct antecedent of § 301 was § 10 of the Case bill, H.R. 4908, 79th Cong., 2d Sess., which was passed by both Houses

Similarly, in *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, the Court quoted the House Conferees as having "agreed that suits for breach of such agreements should remain wholly private and '*be left to the usual processes of the law*'." 370 U.S. at 207 (emphasis added).

This Court has recently stressed that:

> ". . . labor legislation is peculiarly the product of legislative compromise of strongly held views, . . . and that legislative history may not be disregarded merely because it is arguable that a provision may unambigu-

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of the Congress, but vetoed by the President in 1946." and that:

". . . the Case bill contained provisions substantially the same for present purposes as the provisions of § 301 at issue in this case." 368 U.S. at 509 (Footnote omitted).

It then observed that:

"A spokesman for the (Case) bill, Senator Ferguson, stated unequivocally that state court jurisdiction would not be ousted by enactment of the federal law:

'Mr. Ferguson. Mr. President, there is nothing whatever in the now-being-considered amendment which takes away from the State courts all the present rights of the State courts to adjudicate the rights between parties in relation to labor agreements. The amendment merely says that the Federal courts shall have jurisdiction. It does not attempt to take away the jurisdiction of the State courts, and the mere fact that the Senator and I disagree does not change the effect of the amendment.

'Mr. Murray. But it authorizes the employers to bring suit in the Federal courts, if they so desire.

'Mr. Ferguson. That is correct. That is all it does. *It takes away no jurisdiction of the State courts.*' 92 Cong. Rec. 5708." 368 U.S. at 512 (emphasis added).

In Dowd Box, *supra* (1962) 368 U.S. 502, 7 L. Ed. 2d 483, the Court also quoted Senator Ball, "one of the Floor leaders for the bill" as stating:

"'[W]e give to employers the right to sue a union in interstate commerce, in a Federal court, for violation of contract. *It does not go beyond that.* As a matter of law, I think they have that right, now, but because unions are voluntary associations, the common law in a great many States requires service on every member of the union, which is very difficult; . . .' 93 Cong. Rec. 5014." 368 U.S. at 512 (emphasis added; footnote omitted).

ously embrace conduct called in question." *NLRB* v. *Allis-Chalmers Mfg. Co.* (1967) 388 U.S. 175, 179, 18 L. Ed. 2d 1123.

Accord: *National Woodwork Mfrs. Ass'n* v. *NLRB* (1967) 386 U.S. 612, 619-20, 18 L. Ed. 2d 357.

The decision of the court below clearly encroaches upon the existing jurisdiction of a state court. It displaces "thoroughly considered jurisdiction of the various courts of the United States over contracts made by labor organizations." It abolishes an "existing state court jurisdiction."

Applying the tests enunciated in *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 701-03, 16 L. Ed. 2d 192, it seems evident that elimination of the present existing state court injunction remedy is not necessary in order to achieve any significant goal of labor policy which Congress had in mind in 1947. Congress did not believe that the existence of an effective remedy for violation of a labor contract would impede the formation of collective agreements. In their minority report annexed to Senate Report No. 1177, 79th Cong., 2nd Sess., in support of the wording of Section 301(a), which was ultimately accepted by the Congress, Senators Ball, Taft and H. Alexander Smith stated, at pages 13-14:

> "It has been argued that the result of making collective agreements enforceable against unions would be that they would no longer consent to the inclusion of a no-strike clause in a contract.
>
> "This argument is not supported by the record in the few States which have enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.
>
> "In any event, it is certainly a point to be bargained over and any union with the status of 'representative'

> under the NLRA which has bargained in good faith with an employer should have no reluctance in including a no-strike clause if it intends to live up to the terms of the contract. The improvement that would result in the stability of industrial relations is, of course, obvious." [14]

Also, it is evident that the continued existence of the injunctive remedy in the many States where the remedy is available cannot in any legitimate way impede "the private settlement of disputes." If it has promised not to strike for the term of the agreement, as in the instant case, a union has no right to employ the strike remedy to pressure the settlement of a dispute arising during the term of the agreement. The 1947 Senate Report, *supra*, stated, at page 16:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations." [15]

This Court recognized the union's obligation not to strike in violation of agreement, stating, in *Lincoln Mills*, *supra* (1957) 353 U.S. 448, 455, 1 L. Ed. 2d 972:

> "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." [16]

Assuming, as we must, that the private settlement of disputes and the Congressional objective of labor peace will be enhanced by requiring unions to keep their promises not to strike, it is apparent that Congressional policy is best

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[14] Reproduced in legislative history annexed to Lincoln Mills decision (1957) 353 U.S. 448, 501-02, 1 L. Ed. 2d 972, 1005.

[15] Quoted in Lincoln Mills, *supra*, 353 U.S. at 454, 1 L. Ed. 2d at 979.

[16] Paraphrasing one commentator, Lincoln Mills dealt with the "quid"—Avco is the "quo." Isaacson, *The Grand Equation: Labor Arbitration and the No-Strike Clause* (1962) 48 ABAJ 914, 920-21.

accomplished by *more* enforcement—not *less* enforcement—of the no-strike clause than that which existed when Section 301(a) was enacted. Surely, in view of the assurances quoted above given by Senators Taft, Ferguson, Ball and others, it would outrage Congressional policy to construe this Act, which was clearly intended to give *additional* remedies not then available, as taking away a then existing remedy which was effective in the enforcement of no-strike agreements.

The Court looked to Congressional intent in its recent decision in *Vaca* v. *Sipes* (1967) 386 U.S. 171, 17 L. Ed. 2d 842. After exceptions to the Federal pre-emption rule were reviewed, the Court stated:

> "While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." 386 U.S. at 180.

The Court, in holding that the duty of fair representation had not been pre-empted by the LMRA, and could still be enforced by a state court, observed that:

> "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. . . . The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb

> arbitrary conduct by the individual employee's statutory representative." 386 U.S. at 182-83.

If, in the instant case, the Court likewise looks to the intention of Congress in 1947 in construing the true dimensions of Section 301, it must likewise conclude that Congress had no intention of ousting state courts, such as the Chancery Court of Tennessee, of their traditional jurisdiction to enforce collective bargaining agreements by injunctive process. Indeed, to paraphrase Mr. Justice Frankfurter, "No one would have been more startled by such a conclusion than [Senator Taft]." [17]

There is no basis at all for the view of the court below that Congress, in enacting Section 301 in 1947, in some way intended to apply the restrictions of the Norris-LaGuardia Act to state courts and to pre-empt this limited remedial area of state court jurisdiction and make it a part of federal law. There is not a word in the 1947 legislative history to support such a farfetched inference.

In *Sinclair Refining Co.* v. *Atkinson*, *supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, this Court reviewed the possible impact of Section 301 on Norris-LaGuardia. It had been contended that Section 301 impliedly modified or partially repealed Norris-LaGuardia. The Court rejected this construction, observing that:

> ". . . the failure of Congress to include a provision in § 301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act must be evaluated in the context of a statutory pattern that indicates not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed derisable.

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[17] Mr. Justice Frankfurter's reference was to "Mr. LaGuardia." United States v. United Mine Workers (1947) 330 U.S. 258, 316, 91 L. Ed. 884, 925.

> "When the inquiry is carried beyond the language of § 301 into its legislative history, whatever small doubts as to the congressional purpose could have survived consideration of the bare language of the section should be wholly dissipated." 370 U.S. at 205.

When similar reasoning is applied to the instant problem, the error in the decision of the court below is apparent. It must be regarded as significant that Congress, which in 1947 was completely familiar with the restrictive provisions of the Norris-LaGuardia Act and their limited application at that time to federal courts, did not include an express provision in Section 301 extending the Norris-LaGuardia restraints to state courts and state court labor injunctions.

Also, as indicated above, when the inquiry is carried into the legislative history of Section 301, any doubts about Congressional intention should be wholly dissipated. In *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, the Court stressed that the Congressional Conferees "agreed that suits for breach of such [labor] agreements should remain wholly private and 'be left to the usual processes of the law.' . . .", citing Conference Report No. 510, reported in 1 Leg. Hist. 545-46. 370 U.S. at 207. The Court also stated that it could not:

> ". . . accept the startling argument made here that even though Congress did not itself want to repeal the Norris-LaGuardia Act, it was willing to confer a power upon the courts to 'accommodate' that Act out of existence whenever they might find it expedient to do so in furtherance of some policy they had fashioned under § 301." 370 U.S. at 209.

The Court said:

> "The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters. Our task

> is the more limited one of interpreting the law as it now stands. In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent" 370 U.S. at 214-15.

The House Committee which participated in the drafting of the 1947 legislation expressed its view that:

> "When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens." [18]

Congress knew in 1947 that state courts, in the exercise of their traditional equity jurisdiction, were enjoining strikes in breach of collective bargaining agreements and that the Norris-LaGuardia Act itself did not apply to them. In Senate Report No. 105, 79th Cong., 2nd Sess., it was stated, for example, that:

> "A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act, and the courts of many of these jurisdictions have held that a strike in violation of a collective agreement is a 'labor dispute' and cannot be enjoined (*The Nevins* v. *Kasmach*, 279 NY 323; *Bulkin* v. *Sacks*, 31 Pa.D & C 501)." [19]

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[18] House Report No. 245 on H.R. 3020; 80th Cong. 1947, 1 Leg. Hist. at 337. Although the House members failed in their effort to make Norris-LaGuardia inapplicable to suits for strike injunctions in the federal courts, their statement strongly implies an intention not to preempt state court no-strike injunctions.

[19] Quoted in Legislative History annexed to Lincoln Mills decision, 353 U.S. at 500, 1 L. Ed. 2d at 1004.

Also illustrative are colloquies during the course of Senate debate on May 9, 1947. In discussing a proposed amendment which would have authorized federal court injunction against strike activities affecting perishable goods, the following colloquies occurred:

> "Mr. Pepper. I am not sure but that the local citizen the Senator from Nebraska describes would have the right of injunctive relief in a local court. We are simply giving the right in the Federal court, but he still has local machinery of which he may avail himself to prevent irreparable damage, if he can make a showing. It seems to me this would bring the matter into Federal jurisdiction.
>
> "Mr. Wherry. I agree that there are remedies in every State, but we are passing a Federal law, to give injunctive relief.
>
> "Mr. Pepper. The Senator would probably find the circuit judge closer than the Federal judge in most States, and I suggest a man would have a complete and adequate remedy in the local courts." 2 Leg. Hist. at 1379-80.

Subsequently, on the same subject, there occurred the following colloquy:

> "Mr. Pepper. There is no doubt of the injunctive power to restrain the commission of an unlawful act. One who might show damage from the unlawful act it seems to me might well be heard and might well have a case in the local courts.
>
> "Mr. Taft. Mr. President, will the Senator yield?
>
> "Mr. Pepper. I yield.
>
> "Mr. Taft. I want to point out that there is no law against courts issuing injunctions. We are using a rather general term here. Of course, a court may always issue an injunction in connection with a lawsuit except as limited by the Norris-LaGuardia Act." 2 Leg. Hist. at 1381.

Apart from legislative history, policy considerations demand the conclusion that Section 301 does not pre-empt the injunctive jurisdiction of state courts and confer an abortive equity jurisdiction on courts of the United States. As indicated above, the dominant objective of Congress was to plug loopholes in the enforcement of collective bargaining agreements. Unions could be sued in federal courts as entities without reference to diversity of citizenship or jurisdictional amount and without taking away "jurisdiction of the state courts." In 1947, Congress was concerned with a statute enacted in 1935 which had radically changed the then existing law of master and servant. The Wagner Act *compelled* employers in interstate commerce to recognize and bargain with labor unions as exclusive bargaining representatives for employees, even though such unions may have been designated by a bare majority of the employees in the appropriate bargaining unit.[20] The employer was required to "bargain in good faith" with such labor organizations as representative for all in the unit. The objective and end product of this compulsion was to be a written and signed collective bargaining agreement setting forth the wages, hours, working conditions and other terms of employment in the bargaining unit for a reasonable period of time. In *Lincoln Mills, supra* (1957) 353 U.S. 448, 453, 1 L.Ed. 2d 972, this Court observed that in enacting Section 301 Congress was "interested in promoting collective bargaining that ended with agreements not to strike" and in 353 U.S. at page 454 quoted the Senate Report (page 16), as stating:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement

[20] "When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties.

> does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract."

To the same effect, a well-known commentator has observed that:

> ". . . About all an employer can get in exchange for his commitments in a collective agreement is continued production—no work stoppages for the life of the agreement. Most employers assume that they don't get even this unless the union signs a no-strike pledge and promises that the union officials will take action against wild-cat strikes and work stoppages. Of course, unions say that employers get a supply of labor in exchange for their concessions in collective agreements. But employers get no more labor now than they did before unions existed . . ." [21]

Persons with experience in this field are well aware that an injunction, such as that issued by the Chancery Court of Tennessee in the instant case, is the only "effective" method of assuring freedom from economic warfare for the term of the agreement. It has been aptly said that:

> "The discharge of strike leaders does not end the strike; at best, it stops future efforts. A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied business because he cannot deliver. *Equitable relief is not only*

This is not true of the labor agreement." United Steelworkers of America v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 580, 4 L. Ed. 2d 1409, 1416.

[21] Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 Wash. U. L. Q. 3, 12.

> *the most appropriate remedy, but also the only effective one.*" (emphasis added).[22]

It has also been pointed out that the damage remedy is peculiarly ineffective in a strike situation, because the discipline which makes the strike possible enables the union leaders to insist on dismissal of the damage suit as a condition to ending the strike. In many cases, therefore, the damage remedy is merely a mirage.[23] In the words of one commentator, damages are "patently a miserable substitute for performance."[24] The recognition in *International Ass'n of Machinists* v. *Street* (1961) 367 U.S. 740, 773, 6 L. Ed. 2d 1141, that sometimes: "[*an injunction*] *alone can effectively guard the plaintiff's right*" shows that this Court is well aware of the realities of industrial life considered above. (emphasis added).

Thus, if the objective of labor peace sought by Congress is to be achieved, traditional injunctive remedies available in the courts of most States at the time of the enactment of Section 301 must be preserved and encouraged—not withdrawn and destroyed by attributing a construction to Section 301 which clearly would have been inconceivable to the Senators and Representatives who enacted Section 301 in the climate of 1947.

In attempting to minimize the unfortunate impact of its decision on labor peace, the court below stated, in footnote 3 (A. 46) that:

> "An employer may obtain an order directing a Union to comply with its agreement to arbitrate. A strike in the face of such an order could result in contempt proceedings. This alternative remedy is referred to in

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[22] Stewart, *No-Strike Clauses in the Federal Courts*, 59 Mich. L. Rev. 673, 675 (1961).

[23] Swigert, *"Where Labor Unions Get Their Power,"* U.S. News & World Report, January 21, 1963, at 96, 97.

[24] Rice, *A Paradox of Our National Labor Law*, 34 Marquette L. Rev. 233, 253 (1951). See also, Rice *supra*, at 235, note 15.

Sinclair Refining Co. v. *Atkinson*, *supra*, page 214 and page 227, n. 23."

It is true that in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, the Court said adherence by federal courts to Norris-LaGuardia restraints,

> ". . . does not impair the right of an employer to obtain an order compelling arbitration of any dispute that may have been made arbitrable by the provisions of an effective collective bargaining agreement." 370 U.S. at 214.

There is no statement that a strike while the arbitration process was taking place would be punished by the federal courts as contempt of the order to arbitrate. The dissenting Justices commented in footnote 23 that:

> "Consistently with what we said in *Lucas*, *supra*, note 2, a strike in the face of such an order would *risk* a charge of contempt." 370 U.S. at 227 (emphasis added).

In *Lucas Flour* (1962) 369 U.S. 95, 7 L. Ed. 2d 593, referred to by the dissenting Justices, the Court merely held that:

> ". . . a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of *the agreement*." 369 U.S. at 105 (emphasis added).

It does not necessarily follow that such a strike would be punishable as contempt of court. On the contrary, in *Lucas Flour*, the remedy there approved by the Court was the award of money damages to an employer. Breach of "agreement" is not contempt.

In *Sinclair*, *supra*, the agreement provided "for compulsory, final and binding arbitration. . . ." 370 U.S. at 197. This Court held that because of the provisions of

Norris-LaGuardia, the United States District Court could not by injunction stop the strike which violated the arbitration agreement. It would circumvent the restrictions of Norris-LaGuardia, as so construed, to hold that the District Court could have done by indirection what it could not have done directly—that it could have ordered the union to arbitrate, and then could have punished it for continuing the strike—even though it could not have ordered an end to the strike itself.[25] Moreover, it is difficult to see how a court could convict a union which literally obeyed the order to arbitrate simply because it asked its members to cease work while the arbitration proceeding was taking place. The only way such a result could be achieved would be to imply an order not to strike from the order to arbitrate. If, as this Court has held in *Sinclair*, *supra*, Section 4 of Norris-LaGuardia "deprives the courts of the United States of jurisdiction to enter" an injunction to prohibit the refusal to perform work (370 U.S. at 203), it would seem to follow that no such injunction could be implied. This being true, it would seem very doubtful that a union which strikes while arbitration proceedings are in process could be held in contempt of the order to arbitrate.[26]

The suggestion of the court below that the problem of stopping a strike in breach of contract can be solved by ordering compliance with the agreement to arbitrate and

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[25] See concurring and dissenting opinion of Mr. Justice Douglas in Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n (November 6, 1967), 36 U.S. L.W. 4001, 4005, *rev'g* (CA 3; 1966) 365 F. 2d. 295 and 368 F. 2d 932.

[26] This Court did not reach the question in Philadelphia Marine Trade Ass'n v. Local 1291, Int'l Longshoremen's Ass'n, *supra*. In that case an arbitrator had already ruled. The District Court purported to enforce the arbitrator's ruling, and found the union in contempt for not accepting the ruling, and going on strike. In reversing, this Court held that the mandatory injunction issued by the District Court had not been sufficiently specific to meet the requirements of Rule 65(d) of the Federal Rules of Civil Procedure. Accordingly, the Norris-LaGuardia question was not decided by this Court.

punishing violation by contempt is defective in another respect. There is no provision in applicable federal law for compulsory arbitration. Section 8(d) of the Labor Management Relations Act, 1947, 61 Stat. 142-143, 29 U.S.C. 158(d) (1964) specifies, in defining the duty to bargain, that "such obligation does not compel either party to agree to a proposal or require the making of a concession." Thus, it is quite lawful for an employer and a union to sign a collective bargaining agreement which forbids strikes for the duration of the contract and contains *no* provision for arbitration, leaving the parties to their usual legal remedies for breach of the contract. See *NLRB* v. *American National Insurance Co.* (1952) 343 U.S. 395, 96 L.Ed. 1027. When the no-strike clause in such a contract is violated, the employer should have just as much right to injunctive relief as an employer who has agreed to arbitration. However, the procedure suggested by the court below can give no relief in this situation, even though the employer's contract is lawful and binding, irreparable injury is threatened, and the legal remedy is inadequate.

Today, therefore, as a practical matter, only a state court, exercising traditional equity jurisdiction, can effectively *stop* a strike in breach of contract. If the ruling of the court below is sustained, the end product of the cumbersome and costly compulsory collective bargaining system erected by Congress in 1935, and reaffirmed and reenforced in 1947, will be contracts which contain a cornucopia of benefits for unions and the employees they represent, and a meaningless, practically unenforceable no-strike pledge for employers. Such a reality would expose employers to the possibility of costly disruptive pressures throughout the contract term. The resulting strikes would tend to inflate the cost of goods and services and interrupt their supply. The ultimate consumer would pay the bill. Making contract violation by unions easier than it was in

1947 cannot possibly foster the general welfare, or be in accord with Congressional intent or public policy.

In *Sinclair, supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, the Court held that its hands were tied by statutory language and legislative history. In the instant case, these inhibiting restraints are absent.

Permitting the States to give a more effective remedy than that presently available in the federal courts does not impair the *Lincoln Mills* concept of substantive uniformity. The state courts can still be required to apply federally fashioned law in *interpreting* contracts. But, as in *Hoosier Cardinal, supra* (1966) 383 U.S. 696, 16 L.Ed. 2d 192, matters which relate principally to remedy are "unlikely to frustrate in any important way the achievement of any significant goal of labor policy" [27] and should be left to the traditional practices of equity in the several States.

The Court of Appeals expressed concern that if removal is denied "effectiveness of the injunctive remedy would vary from State to State." (A. 47). But under *Hoosier-Cardinal, supra*, the applicable statute of limitations varies from state to state. Also, under *Erie R.R.* v. *Tompkins* (1938) 304 U.S. 64, 82 L. Ed. 1188, the substantive law applied in Federal Courts in diversity cases varies from state to state. This is no reason for depriving a state court of jurisdiction protected by the Tenth Amendment.

Summarizing, in *Dowd Box* and *Lucas Flour*, uniformity was necessary in order to accomplish the objective of Congress. Here, a slavish and sterile application of the concept of uniformity would frustrate and defeat the expressed objective of Congress. Therefore, the reason for uniformity does not exist here as it did in the earlier cases and "uniformity" should not be applied to deprive the state court of its jurisdiction.

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[27] Hoosier Cardinal, *supra*, (1966) 383 U.S. at 702, 16 L. Ed. 2d at 197.

III

THE SUIT WAS NOT REMOVABLE BECAUSE THE DISTRICT COURT DID NOT HAVE ORIGINAL JURISDICTION FOUNDED ON A CLAIM OR RIGHT ARISING UNDER THE CONSTITUTION, TREATIES OR LAWS OF THE UNITED STATES.

Under the language of Section 1441(b) of the Judicial Code of 1948, 62 Stat. 938, 28 U.S.C. 1441(b) (1964), the instant cause is removable only if it is held to be a "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States . . . ." For reasons detailed in Section II C. above, and for additional reasons set forth below, it is submitted that the suit was not removable and should have been remanded to the state court.

A. Removability Should Be Decided in the Light of Congressional Policy, With Doubts Being Resolved Against Removal.

It is elementary that doubts must be resolved against removal, and that the burden is on the party attempting removal to justify the grounds for it. In *Shamrock Oil & Gas Corp.* v. *Sheets* (1941) 313 U.S. 100, 85 L.Ed. 1214, this Court stated that the removal statute evidenced "the Congressional purpose to restrict the jurisdiction of the federal courts on removal" and that:

> ". . . the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments, which should actuate fed-

eral courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' [Citing cases]" 313 U.S. at 108-09.

As pointed out by Judge Kalodner in *American Dredging Co., supra* (CA 3; 1964) 338 F. 2d 837, at pages 842-43, it is well settled that federal statutes should be construed and applied so as to avoid injustice or absurd consequences. "The reason of the law, in such cases, should prevail over its letter." [28]

Also,

"All laws are to be given a sensible construction, and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. . . . In ascertaining that purpose, we may examine the title of the act [Citing cases] . . . and the legislative scheme or plan by which the general purpose of the act is to be carried out." [29]

The impact of Section 301, and its relationship to Norris-LaGuardia and the removal sections of the Judicial Code of 1948, must be determined in the light of these constructional principles, and with regard to dominant Congressional policy, which was to make collective bargaining agreements *more* enforceable through preserving the established jurisdiction of the state courts (including jurisdiction to issue injunctions) and adding an additional federal court damage remedy.

The significance of such policy factors in arriving at a correct decision in the instant situation has been recognized

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[28] United States v. Kirby (1869) 7 Wall. 482, 487, 74 U.S. 482, 486-87, 19 L. Ed. 278, 280.

[29] United States v. Katz (1926) 271 U.S. 354, 357, 70 L. Ed. 986, 988-89.

by commentators. One writer who has given the problem thorough analysis states that:

> ". . . the solution to this problem should depend upon competing policy considerations rather than a sifting of purely legal considerations. Any decision in this area should be rendered only after the policy of section 301—to make available more effective means of enforcing collective bargaining agreements—is carefully considered. The allowance of state court injunctions and the denial of removal would be one means of furthering that policy." [30]

In the words of another commentator:

> "[I]f state courts do still have the power to enjoin such strikes [in breach of contract], permitting removal would put the removal statutes to a use for which they were never intended. Although the legislative history of the Judicial Code provides no substantial insight into the congressional purpose in allowing removal of suits involving federal questions, removal was certainly not intended to foreclose entirely remedies legitimately available in state courts." [31]

B. The Petitioner's State Court Suit Did Not Arise "under the Constitution, treaties or laws of the United States."

In Section II C. above, it was established that in enacting Section 301, Congress had no intention of depriving state courts of existing enforcement remedies, including their traditional remedy of injunction for breach of contract

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[30] Moskowitz, *Enforcement of No-Strike Clauses by Injunction*, 46 Boston U. L. Rev. 343, 359 (1966).

[31] 113 U. Pa. L. Rev. 1096, 1098 (1965). *Professor Moore* is in accord: "The majority view, which we believe is sound, is that the federal district court must remand suits requesting injunctive relief that is beyond the federal court's original jurisdiction, even when the action couples a prayer for damages, and even when the federal court believes that the state court lacks jurisdiction." *Moore, Federal Practice*, 2d. Ed., Vol. 1A, Sec. 0.167[7], pages 1004-05. See also, *Moore supra*, at 1009.

where irreparable injury otherwise would result. The "basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations." Congress "expressly intended not to encroach upon the existing jurisdiction of the state courts." The Congressional purpose "was not to displace, but to supplement, the thoroughly considered jurisdiction of the various States over contracts made by labor organizations." The purpose "was to fill the gaps in the jurisdictional law of some of the States, not to abolish existing state court jurisdiction." The Act "takes away no jurisdiction of the State courts." Congress "deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.' " [32]

The statutes in question should be construed so as to effectuate this intention and objective of Congress and not to frustrate it. This Court has held in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L. Ed. 2d 440, that Congress did not intend to confer on the federal courts jurisdiction to enjoin a strike in breach of contract. Therefore, a suit filed in a state equity court seeking injunctive relief should be held to arise under the laws of that State and not under the laws of the United States. This should be true even though construction of the contract is regarded as a matter of federal law. As Judge Kalodner pointed out in *American Dredging Co.*, *supra* (CA 3; 1964) 338 F. 2d 837, a case does not arise "under the Constitution or a law of the United States merely because it is founded on a right conferred by the Constitution or a federal law." [33]

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[32] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. at 508-09 and 511-13, 7 L. Ed. 2d at 488-90.

[33] American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Engineers (CA 3; 1964) 338 F. 2d at 844.

In *Gully* v. *First National Bank in Meridian* (1936) 299 U.S. 109, 115, 81 L.Ed. 70, this Court observed that:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit."

To the same effect this Court stated, in *Shulthis* v. *McDougal* (1912) 225 U.S. 561, 569, 56 L.Ed. 1205, that:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

Likewise, in *Pan American Petroleum Corp.* v. *Superior Court* (1961) 366 U.S. 656, 662, 6 L.Ed. 2d 584, this Court stated that questions "of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law."

It is submitted that in its implementation of the doctrine of *Lincoln Mills, supra* (1957) 353 U.S. 448, 1 L.Ed. 2d 972, this Court should limit its fashioning of uniform, paramount, federal law to areas where uniformity is important to the achievement of Congressional objectives. Until state law conflicts in an area important to the Congressional objective, and has been absorbed by federal law, it continues to exist, and may co-exist with federal law. As Section 301(a) was never intended to apply to suits for injunction against strikes, the state injunction remedy can so co-exist. In *Kelly* v. *State of Washington* (1937) 302 U.S. 1, 82 L.Ed. 3, it has been observed that:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appro-

priate to their territorial jurisdiction although interstate commerce may be affected. [Citing cases] States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced." 302 U.S. at 9-10.[34]

C. The District Court Did Not Have "Jurisdiction" of the Cause

The Dictionary defines "jurisdiction" as, "[t]he authority by which judicial officers take cognizance of and decide causes . . . the power to hear and determine a cause . . ." [35]

"Jurisdiction", as used in 28 U.S.C. 1441(b) (1964), means jurisdiction of the cause. In *Reynolds* v. *Stockton* (1891) 140 U.S. 254, 268, 35 L.Ed. 464, the Court stated that:

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case."

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[34] Accord: California v. Zook (1949) 336 U.S. 725, 93 L. Ed. 1005 and cases discussed therein. For a relevant application of the principle, see El Mundo v. Puerto Rico Labor Relations Board (1965) ... P.R. ..., 53 CCH Lab. Cas., Sec. 51,472, *cert. denied* (1966) 384 U.S. 939, 16 L. Ed. 2d 538, in which the Puerto Rico Supreme Court rejected a contention that Section 301 had preempted the labor contract enforcement field, and stated, "The fact that the Federal legislation authorizes an action for damages for such violation—Section 301, Taft-Hartley Act—and that such actions for damages are within the jurisdiction of the courts, either federal or state, does not prevent our Labor Relations Board, as an administrative agency, from taking cognizance under our Act of such violations as an unfair practice. This question has been clearly decided by this Court." 53 CCH Lab. Cas., Sec. 51,472 at page 65,243.

[35] *Bouvier's Law Dictionary*, Rawle's Third Revision, page 1760.

The court below stated that:

> "The Norris-LaGuardia Act does not deny to Federal Courts jurisdiction over the parties or the subject matter.
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> * * * * *
>
> "The loss of the power to grant certain equitable remedies does not mean Federal Courts have lost jurisdiction over the subject matter or parties." (A. 43)

In so holding, the court seems to have ignored the repeated use by Congress of the precise word "jurisdiction" in the Act,[36] and the repeated statement that no federal court "shall have jurisdiction to issue" an injunction in a labor dispute. Also, the court seems to have overlooked a significant holding by this Court in *Sinclair*, *supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, relied on heavily by the Third Circuit in its decision in *American Dredging Co.*, *supra* (CA 3; 1964) 338 F. 2d 837. Count 3 of the complaint filed by the employer in the District Court in *Sinclair* prayed for injunctive relief against breach of the no-strike clause. This Court, finding that the suit in the District Court filed under Section 301 was subject to the

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[36] In its Title, the Norris-LaGuardia Act declared that it was "An Act to amend the Judicial Code and to define and *limit the jurisdiction* of courts sitting in equity, and for other purposes." Section 2—"Declaration of the public policy of the United States" stated, in relevant part: "In the interpretation of this Act and in determining the *jurisdiction* and authority of the courts of the United States, as such *jurisdiction* and authority are herein defined and limited, the public policy of the United States is hereby declared as follows: . . . therefore, the following definitions of, and limitations upon, the *jurisdiction* and authority of the courts of the United States are hereby enacted." (Quoted in American Dredging Co., *supra*, 338 F. 2d 841; emphasis added). The word "jurisdiction" appears in Sections 1, 2, 4, 5, 7 and 13 of the Act. 29 U.S.C. 101, 102, 104, 105, 107 and 113 (1964). Also, note statement of Mr. Justice Frankfurter in his concurring opinion in United States v. United Mine Workers, *supra* (1947) 330 U.S. 258, 91 L. Ed. 884 at 313. *"Again and again the statute says 'no court shall have jurisdiction,' or an equivalent phrase.* Congress was concerned with the withdrawal of power from the *federal* courts to issue injunctions *in a defined class of cases.*" (emphasis added).

jurisdictional limitations enacted by Norris-LaGuardia, stated, at page 215:

> "The District Court was correct in dismissing Count 3 of petitioner's complaint for *lack of jurisdiction* under the Norris-LaGuardia Act." (emphasis added).

In *General Inv. Co.* v. *New York Cent. R.R.* (1926) 271 U.S. 228, 70 L.Ed. 920, this Court stated, at page 230:

> "By jurisdiction we mean power to entertain the suit, consider the merits and *render a binding decision thereon* . . ." (emphasis added).

Likewise, in deciding a jurisdiction issue in *Minnesota* v. *Northern Sec. Co.* (1904) 194 U.S. 48, 48 L.Ed. 870, this Court said, at page 63:

> "We proceed, therefore, to inquire whether the Circuit Court could take cognizance of this case upon removal from the state court, and *make a final decree upon the merits.*" (emphasis added).

The Court observed that since the suit did not "involve a dispute or controversy within the jurisdiction of the Circuit Court *for the purposes of a final decree,*" it should not have been dismissed by the District Court but should have been remanded to the state court. 194 U.S. at 72 (emphasis added).

By way of dicta in earlier cases, the Court has repeatedly described Norris-LaGuardia as denying "jurisdiction" to federal courts.[37]

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[37] In Marine Cooks and Stewards v. Panama S.S. Co., (1960) 362 U.S. 365, 4 L. Ed. 2d 797, the Court stated that: "Section 4 of [Norris-LaGuardia] specifically denies jurisdiction to District Courts to issue any restraining order . . ." (362 U.S. at 366) and further stated, at page 372, "All we decide is that the Norris-LaGuardia Act deprives the United States court of jurisdiction to issue the injunction it did under the circumstances shown." See discussion and citation of similar cases in American

The court below stated that:

> "The Federal Courts are denied the power to grant injunctive relief under the provision of Section 4 of the Act, and permitted to grant injunctive relief under the provision of Section 7 of the Act." (A. 43)

It reasoned that:

> "Under Section 7 of the Norris-LaGuardia Act, Federal Courts may grant injunctions under certain enumerated circumstances. Professor Chafee cogently argued that if Federal Courts have no subject matter jurisdiction, then how can the Court sit without jurisdiction until certain facts are proved and then decide whether it has the power to act? The answer is, jurisdiction attaches from the beginning or not at all." (A. 45)

It is submitted that such reasoning leads to an unrealistic and erroneous conclusion. It is true that Section 7 makes an exception to its general prohibition against federal court injunctions when certain specified facts are alleged. The presence or absence of jurisdiction under Section 7 is normally determined by examining the complaint. *Grace Co.* v. *Williams* (CA 8; 1938) 96 F. 2d 478. The Bill of Complaint in the instant case, filed with the Chancery Court of Tennessee, did not allege the jurisdictional prerequisites enumerated in Section 7. (A. 2-10) Therefore, the District Court in Tennessee had no jurisdiction under Section 7 to grant injunctive relief in the instant case.

It is patently erroneous to assume that a civil action is one "of which the District Courts have original jurisdiction founded on a claim or right arising under the . . . laws of

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Dredging Co., *supra*, 338 F. 2d at 851-52. In Sinclair, *supra* (1962) 370 U.S. 195, 227, 8 L. Ed. 2d 440, 458, Mr. Justice Brennan, in his dissenting opinion, stated: "But if §4 is to be read literally, removal will not be allowed." Accord: *Moore, Federal Practice*, 2d Ed., Vol. 1, Sec. 0.60[1], p. 603.

the United States," merely because the District Court has jurisdiction in a suit filed with it in which a labor injunction is sought, to examine the complaint and determine whether the requisite jurisdictional facts under Section 7 have been alleged. The fact that a court always has initial jurisdiction to determine its own jurisdiction does not necessarily mean that every action filed with the court is one over which the court has "original jurisdiction." In the absence of diversity or jurisdictional amount, for example, the federal court may lack jurisdiction over the cause despite the fact that it necessarily has jurisdiction to determine whether the jurisdictional prerequisites established by the Constitution or Congress have been alleged. See *Thomson* v. *Gaskill* (1942) 315 U.S. 442, 86 L.Ed. 2d 951; *Robertson* v. *Railroad Labor Bd.* (1925) 268 U.S. 619, 69 L.Ed. 1119.

Similarly, in *United States* v. *United Mine Workers*, *supra* (1947) 330 U.S. 258, 91 L.Ed. 884, this Court concluded that "[a]ssuming . . . the Norris-LaGuardia Act applied to this case and prohibited injunctive relief," the District Court not only had jurisdiction to determine its own jurisdiction, but also "had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." 330 U.S. at 295 and 293.

In a further effort to establish jurisdiction in the District Court under Section 301 despite Norris-LaGuardia, the court below reasoned that:

> "The relief prayed for was an injunction and general relief. If Avco had not asked for general relief, it would have been entitled to any appropriate relief, other than an injunction, under Rule 54(c), Federal Rules of Civil Procedure. Under the Rules of Civil Procedure, federal courts in their discretion may grant relief of a kind not requested in the pleading of either party. [Citing case]." (A. 45-46)

In an earlier portion of this brief, it was pointed out that the prayer for "general relief" in the instant Bill of Complaint was meaningless under Tennessee Chancery Court practice, and that the Tennessee court would have dismissed the cause if it had concluded that injunctive relief was not justified, without retaining jurisdiction to consider the possibility of some other form of relief, such as money damages. (Page 8, *supra*) [38] Assuming that the Bill of Complaint sought only injunctive relief, it seems clear for reasons detailed above, that the suit should not be removable under Section 1441(b).

In an effort to justify jurisdiction, however, the Court of Appeals invoked Federal Rule 54(c). Reliance on the rule simply begs the question. If, as the Petitioner contends, the cause was not removable, Rule 54(c), which applies only to federal proceedings, would be inapplicable and could not possibly be resorted to to bolster an otherwise absent jurisdiction. In any event, as pointed out by Judge Kalodner in *American Dredging Co., supra* (CA 3; 1964) 338 F. 2d 837, Rule 82 specifies that, "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein." 338 F. 2d at 848.

Reliance on Rule 54(c) seems impermissible for another reason. In *Great Northern R.R.* v. *Alexander* (1918) 246 U.S. 276, 62 L.Ed. 713, it was held that in determining removability the allegations of the plaintiff's pleading in the state court control and that:

> ". . . in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to re-

[38] In a decision subsequent to Avco, the District Court below acknowledged that the prayer for "general relief" was immaterial to its decision. Oman Construction Co. v. Teamsters Local 327 (M.D. Tenn. 1966) 263 F. Supp. 181, 183.

> movability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case, nonremovable when commenced, shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion." 246 U.S. at 282.

Similarly, in *Pan American Petroleum Corp.* v. *Superior Court, supra* (1961) 366 U.S. 656, 6 L.Ed. 2d 584, it was stated, at 662:

> "But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since 'the party who brings a suit is master to decide what law he will rely upon,' . . . the complaints in the Delaware Superior Court determine the nature of the suits before it."

Accord: *Gully* v. *First National Bank In Meridian, supra* (1936) 299 U.S. 109, 81 L.Ed. 70.

Of course, the Bill of Complaint in the instant case made no reference to Rule 54(c). The rule by its terms applies only to proceedings in federal courts. To apply the rule in order to determine removability of the case would deprive the Petitioner of its right, through the allegations of its Bill of Complaint, to "determine the status with respect to removability" and thus would violate the teaching of the *Great Northern* case.

In its search for jurisdiction, the Court of Appeals stated that:

> "The strike against Aveo gave rise to a single cause of action for which any number of different remedies were available. See *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951), where the Supreme Court defined cause of action as being predicated on a single wrong to plaintiff for which relief is sought. While the injunctive remedy has played an important part in the history of labor law, such close relationship between this effective remedy and the cause of action does not mean the two are coextensive. Here the complaint stated a single cause of action." (A. 45)

From the hypothesis that the complaint "stated a single cause of action," the court apparently inferred that the cause is removable under Section 1441(c), although the section is nowhere specifically referred to in the opinion. The inference is erroneous. Section 1441(c) permits removal of an otherwise nonremovable claim only when it is joined with "a separate and independent claim or cause of action, which would be removable if sued upon alone." (App. A, page 1) In the *Finn* case, cited by the Court of Appeals in the above quotation, this Court reviewed the legislative history of Section 1441(c) and stated that:

> "[w]e conclude that where there is a single wrong to plaintiff, for which relief is sought . . . there is no separate and independent claim or cause of action under § 1441 (c)." 341 U.S. at 13-14.

Thus, the Court held that where the plaintiff's pleading alleges a cause of action predicated on a single wrong for which relief is sought, Section 1441(c) is inapplicable. In the absence of 1441(c), if some part of a case predicated on a single wrong is not removable, no part of the cause is removable. "In other words, *a fragment of a cause of*

action can no longer furnish a basis for removal; one of two or more causes of action may do so." [39] It follows, therefore, that even if, through some rationalization, the Petitioner's Bill of Complaint filed in the Chancery Court is construed as setting forth a single cause of action for money damages (ordinarily cognizable in federal court under Section 301) as well as for injunctive relief (not ordinarily cognizable), the cause would not be removable under either 1441(b) or 1441(c). The reason is that the injunctive part of the single cause is not removable, and under 1441(b) and (c) this blocks removal of the entire cause or any part thereof. *American Fire & Casualty Co.* v. *Finn, supra* (1951) 341 U.S. 6, 95 L.Ed. 702.

Elsewhere in its opinion, the Court of Appeals referred to *Sinclair Refining Co.* v. *Atkinson, supra* (1962) 370 U.S. 195, 8 L.Ed. 2d 440, and observed that in *Sinclair*:

> "The Court dismissed the count requesting an injunction, and the District Court, having jurisdiction over the parties and the subject matter, was free to go to trial on the merits of the count requesting damages." (A. 46)

Of course, *Sinclair* was not a removal case. The complaint was filed in the District Court. Therefore, the case throws little light on the meaning of the word "jurisdiction" as used in the removal sections of the Judicial Code of 1948. It is significant, however, that in *Sinclair*, this Court stated that it was dismissing count 3, in which injunctive relief was sought, "*for lack of jurisdiction under the Norris-LaGuardia Act.*" 370 U.S. at 215 (emphasis added). The action of this Court in dismissing the injunction suit for want of jurisdiction indicates that this Court regards a suit for injunction for breach of a no-strike clause as

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[39] *Moore, Federal Practice*, 2d. Ed., Vol. 1A, Sec. 0.162[1], p. 621.

separate and independent from an action for money damages, and does not subscribe to the view of the court below that there was "a single cause of action for which any number of different remedies were available." (A. 45) Otherwise, it would seem that in *Sinclair* the court below would have been instructed to deny the count for the injunction and go to trial on the merits of the damage count. It is interesting to note that in *American Dredging Co.* v. *Local 25, Marine Div., Int'l Union of Operating Engineers, supra* (CA 3; 1964) 338 F. 2d 837, *cert. denied* (1965) 380 U.S. 935, 13 L.Ed. 2d 822, the court observed in footnote 26 that in addition to the injunction suit which the plaintiff there had filed in the state court, the plaintiff had also filed two separate actions for damages against the defendants. 338 F. 2d at 849. As the damage claims had not been *joined* in the same suit with the injunction claims, however, no problem under Section 1441(c) was presented.

If, contrary to the contentions of this Petitioner, it should be found that the Bill of Complaint below joined *two separate and independent claims*—one for injunctive relief and the other for money damages—so that the language of Section 1441(c) might arguably become operative, the decision of the court below would still have to be reversed. Assuming that the separate and independent damage claim would be removable because of the effect of Section 301, this Court would have to reconcile Section 1441(c) with the provisions of Norris-LaGuardia. This Court has held in *Sinclair, supra,* that the federal court lacks jurisdiction to grant injunctive relief for a strike in breach of contract and that such a claim must be dismissed for want of jurisdiction. It would seem unreasonable, therefore, to construe 1441(c) as bringing along with the

damage action a separate and independent injunction suit over which the District Court would have jurisdiction, despite Norris-LaGuardia and the earlier holding in *Sinclair*. There is no reason to believe that when Congress enacted the removal sections of the Judicial Code of 1948, it intended thereby to make a narrow exception to the general operation of Norris-LaGuardia and permit a district court to enjoin a strike in a breach of contract if the case has been removed to district court under Section 1441(c), but under no other circumstances.[40] As there is no jurisdiction over the injunction suit it must be remanded even though the damage action has been removed.

The two statutes could also be reconciled by holding that it would be an abuse of the discretion permitted by Section 1441(c) for a district judge not to remand the injunctive part of the action where he could not grant injunctive relief because of Norris-LaGuardia.

Whenever a case has been "removed improvidently and without jurisdiction," it is the duty of the district court to remand. Judicial Code of 1948, Section 1447(c), 62 Stat. 939, as amended, 63 Stat. 102 and 78 Stat. 266, 28 U.S.C. 1447(c) (1964) [41] In the instant case, the District

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[40] If the Court should hold, however, that this narrow exception exists, and that the District Court had jurisdiction to enjoin the strike in the instant case, the court below was clearly in error in affirming the action of the District Court dissolving the state court injunction on the theory that Norris-LaGuardia now applies to state courts, and substituting no federal injunction in its place. Indeed, it would have been an abuse of discretion for the District Judge to have done so.

[41] Illustrative is Direct Transit Lines, Inc. v. Starr (CA 6; 1955) 219 F. 2d 699. In Swift & Co. v. United Packinghouse Workers (D. Colo. 1959) 177 F. Supp. 511, where the plaintiff prayed in the state court for both injunction and money damages, and the action was removed, the District Court remanded the suit for injunction and retained jurisdiction over the damage action. *Cf.* National Dairy Products v. Heffernan (E.D.N.Y. 1961) 195 F. Supp. 153. In addition, suits seeking to enjoin strikes in breach of contract or other labor disputes have been remanded in H. A. Lott, Inc. v. Construction and General Laborers Local 145 (S.D. Miss., Jackson

Judge for the Middle District of Tennessee, Nashville Division, should have granted the Petitioner's Motion to Remand. (A. 14)

CONCLUSION

For the reasons stated above, the judgment of the court below should be reversed and the cause should be remanded with directions to reverse the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, reinstate the injunction improvidently dissolved by that court, and remand the cause to the Chancery Court for Davidson County, Tennessee, from

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Division, September 29, 1967), Civil Action No. 4136, unreported; California Packing Corp. v. ILWU Local 142 (D. Hawaii 1966) 253 F. Supp. 597; Kroger Co. v. Milk and Ice Cream Drivers Local 98 (S.D. Ohio 1966) 61 LRRM 2692; Kroger Co. v. Retail Clerks Int'l Ass'n (S.D. Ohio 1964) 56 LRRM 2893; Merchant's Refrigerating Co. v. Warehouse Union Local 6 (N.D. Cal. 1963) 213 F. Supp. 177; Castle & Cooke Terminals, Ltd. v. Local 137, Int'l Longshoremen's Union (D. Hawaii 1953) 110 F. Supp. 247; Sandsberry v. Gulf C. & S. F. Ry. (N.D. Tex. 1953) 114 F. Supp. 834; Hat Corp. of America v. United Hatters (D. Conn. 1953) 114 F. Supp. 890; Associated Telephone Co. v. CWA (S.D. Cal. 1953) 114 F. Supp. 334; American Optical Co. v. Andert (W.D. Mo. 1952) 108 F. Supp. 252. Articles and comments of legal scholars favoring remand, include the following: Janofsky & Vaughn, *The Affirmative Role of State Courts to Enjoin Strikes in Breach of Contract*, 7 B.C. Ind. & Com. L. Rev. 869 (1966); Lesnick, *State Court Injunctions and the Federal Common Law of Labor Contracts: Beyond Norris-LaGuardia*, 79 Harv. L. Rev. 757 (1966); Moskowitz, *Enforcement of No-Strike Clauses by Injunctions*, 46 Boston U. L. Rev. 343 (1966). *Comments:* 36 U. Cin. L. Rev. 702 (1967); 6 B.C. Ind. & Com. L. Rev. 957 (1965); 65 Colum. L. Rev. 907 (1965); 17 Mercer L. Rev. 442 (1966); 41 Notre Dame Lawyer 88 (1965); 113 U. Pa. L. Rev. 1096 (1965).

which it was removed by the Respondents. The Petitioner also prays that it have its costs expended herein.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Section 1441 of the Judicial Code of 1948 (28 U.S.C. § 1441 (1964), 62 Stat. 937) provides:

> § 1441. Actions removable generally
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Section 1447 of the Judicial Code of 1948 (28 U.S.C. § 1447 (1964), 62 Stat. 939, amended May 24, 1949, 63 Stat. 102, and July 2, 1964, 78 Stat. 266) provides in relevant part:

> § 1447. Procedure after removal generally
>
> * * *

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Section 1 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 101 (1964), 47 Stat. 70) provides:

§ 101. Issuance of restraining orders and injunctions; limitation; public policy.

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Section 2 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 102 (1964), 47 Stat. 70) provides:

§ 102. Public policy in labor matters declared.

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom

of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Section 4 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 104 (1964), 47 Stat. 70) provides in relevant part:

> § 104. Enumeration of specific acts not subject to restraining orders or injunctions
>
> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;

Section 7 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 107 (1964), 47 Stat. 71) provides:

> § 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected

persons; temporary restraining order; undertakings.

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the

unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Appendix A

Section 13 of the Norris-LaGuardia Act of 1932 (29 U.S.C. § 113 (1964), 47 Stat. 73) provides:

§ 113. Definitions of terms and words used in chapter.

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing,

or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. § 185 (1964), 61 Stat. 156) provides:

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to

have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.